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No. 1055 73

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

■
NICK FALBO, *Petitioner*

v.

UNITED STATES OF AMERICA

■
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT, AND BRIEF IN
SUPPORT THEREOF**

✓
✓ **HAYDEN C. COVINGTON
VICTOR F. SCHMIDT**
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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT**

To the Supreme Court of the United States:

The above named petitioner presents this his petition for Writ of Certiorari and shows unto the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. Preliminary Statement.

This is one of the cases arising under the Selective Training and Service Act of 1940. There is no disposition to criticize the law as it is but the contention herein is the mal-administration of the provisions of the Act and of the Selective Service Regulations authorized under said Act. Many times this Court has spoken with no

uncertain terms that in civil actions wherein administrative boards have acted unfairly, arbitrarily and capriciously that such actions are reviewable by the courts (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 28, 49 to 54; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Mooreland v. United States*, 280 U. S. 420, 444; *Florida v. United States*, 292 U. S. 1, 12) and in many other instances. Those cases of civil actions involved monetary liability. On the other hand the criminal actions under the Selective Training and Service Act of 1940 involve the life and liberty of the individual. The Constitution of the United States in the Fifth and Sixth Amendments thereof provide specific and cautious protection relative to criminal cases; and the same principle of judicial review should apply with greater force in criminal cases than to those involving monetary interests only.

While it is true that during the past year a strange and novel branch has been grafted on to the otherwise just and equal tree of American criminal jurisprudence in the cases of *United States v. Grieme* and *United States v. Sadlock*, 128 Fed. 2d 811 [appearing in full as appendix hereto], and subsequent cases by which the defenses of the alleged defendant are practically all taken away from one who does not report for military service or work of national importance, yet the petitioner holds that such new theories are wrong and un-American. The various phases of the new problems have never been presented before the Supreme Court of the United States, and the growing anxiety and destructiveness already wrought as a result of this erroneous doctrine warrants early and careful consideration by this Court.

2. Statutory Provisions Sustaining Jurisdiction.

Section 240 (a) of the Judicial Code, 28 U. S. C. A. 347 (a) sustains jurisdiction of this Court.

3. Statute and Regulations Involved.

The particular section of the Selective Training and Service Act of 1940 that is involved in this case is Section 5 (d), or Section 305 (d) of U. S. C. A. Title 50 reading as follows:

"Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this act."

Section 601.5 of the Selective Service Regulations is as follows:

"Delinquent. A 'delinquent' is (1) any man required under the selective service law and directions given pursuant thereto to present himself for and submit to registration on a certain day fixed by the President who fails to so present himself for and submit to registration on that day and has no valid reason for having failed to perform that duty; or (2) any registrant who, prior to his induction into the military service, fails to perform, at the required time or within the allowed period of given time, any duty imposed upon him by the selective service law and directions given pursuant thereto and has no valid reason for having failed to perform that duty."

Section 623.1 (c) of the Selective Service Regulations provides the following:

"In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice."

4. Statement of the Case Showing How Questions Arose Below.

Petitioner was indicted in the United States District Court for the Western District of Pennsylvania on November 12, 1942, on the charge of failure and neglect to perform duties assigned to him in work of national importance under the Selective Training and Service Act of 1940.

Petitioner had been a regular and duly ordained "minister of religion" in full compliance with Title 50 U. S. C. A. 305 (d) [Selective Training and Service Act, Section 5 (d)] and with Section 622.44 (b) and (c) of the Selective Service Regulations, since July 1, 1930. Petitioner at all times from the date of his registration to the time of his conviction at trial on December 1, 1942, was engaged as a full time minister of the Gospel and did no other work and was so ordained and authorized by the Watch Tower Bible and Tract Society of Brooklyn, New York (Transcript of Testimony, pp. 11 and 12). The facts concerning petitioner's ministry were originally stated in his questionnaire and which was duly filed with his Selective Service Local Board No. 11 for Westmoreland County, Pennsylvania.

Petitioner registered with his Local Board on October 16, 1940 (T. T., p. 4). He duly executed and returned his questionnaire to said Local Board on August 23, 1941, in which he asserted that he had been a duly

ordained minister since July 1, 1930 (T. T. 5, 12). The registrant was classified in Tentative 1 on September 25, 1941. While this classification did not affect his standing with respect to the Selective Service System it was one of the requirements for physical examination. When he appealed the Tentative 1 classification on January 26, 1942, he was placed in class 1A by the Appeal Board. Thereafter on January 17, 1942, he was placed in Class 4E as a conscientious objector, although he had asked on his questionnaire and repeatedly thereafter to be considered and classified as a regular and duly ordained minister of the Gospel and placed in Class 4D (T. T. 6).

Subsequent to his filing of his questionnaire petitioner attempted to have a personal hearing before the Local Board for the purpose of presenting additional evidence. When he presented himself before the board one of its members said, "I do not have any damned use for Jehovah's witnesses." He immediately thereafter attempted to produce affidavits from the Watch Tower Bible and Tract Society and from his work that he had done, as well as the Scriptural authority, and when he did this the board stated, "We have no time to listen to this" and he was dismissed (T. T. 28-29).

Although petitioner tried to present additional evidence material to his classification for the consideration of the Local Board and the Board of Appeals, yet he was prevented from so doing, and neither the Local Board nor the Board of Appeals had before it all the evidence in his case. The action by the Board of Appeals could not in any manner cure wanton defects caused by the unfairness and capriciousness of the Local Board, when the Board of Appeals also was prevented from having all the facts in the case and from obtaining such facts because of the prejudice of the Local Board toward petitioner.

On the day of the trial and before any evidence was produced the petitioner herein presented a Plea in Abatement in which were presented the facts in brief fashion of the ministerial status of the defendant for many years prior to the enactment of the Selective Training and Service Act of 1940 and that he was a "minister of religion" at all times since his registration and nothing else. In the Plea in Abatement the Federal Law, Title 50 U. S. C. A. 305 (d) which exempts ministers from training and service but not registration under the Selective Service System was explained to the District Court.

Section 601.5 of the Selective Service Regulations was pointed out to the District Court and which section defines a delinquent under the Act as any registrant who prior to his induction into the military service fails to perform within the required time any duty imposed upon him by the selective service law and directions given pursuant thereto and has no valid reason for having failed to perform that duty. While it is true that petitioner did not report for work of national importance, under the definition of delinquency he had a valid reason for having failed to perform that duty, and that exemption from duty was specifically authorized by the act of Congress.

Section 623.1 of the Regulations which places a duty upon the Local Board to use no discrimination for or against a registrant for race, creed or color, or because of his membership or activity in labor, in politics, religion or other fields. Each registrant shall receive equal and fair justice. This section was grossly violated by uncontradicted evidence that the Board had "no damned use for Jehovah's witnesses" and that it refused to give him any consideration when he personally appeared before the board for hearing. All of details of defense

presented in these last three paragraphs were contained in the Plea in Abatement whereby the trial court was appraised of the line of proof that the defendant proposed to offer, and in and by which the jurisdiction of the trial court was questioned and the efficacy of the indictment was called into question. The Plea in Abatement was overruled to the prejudice of the defendant (Transcript of Testimony, pages 2 and 3).

The Written Motion to Dismiss raised all of the objections to maintaining the cause of action that were originally presented by the Plea in Abatement and in addition thereto attacked the sufficiency of the evidence presented (T. T. 17).

During the trial petitioner tried to introduce as evidence the undisputed facts of his ministry and the matter of the unfairness and capriciousness of the Local Board in denying him a fair and impartial hearing, but he was repeatedly prevented from doing so. The trial court being decidedly of the opinion that the only question at issue was whether or not the registrant reported for service after he had been notified, ruled out all attempts in offers and tenders whereby the Local Board was arbitrary and unfair in its dealing with and classification of the petitioner, to all of which petitioner at the time excepted (Transcript of Testimony, pages 24, 25, 26, 27, 39 and 40).

Petitioner at the time of the trial duly made specific objections to the charge of the Court to the jury, specifically that statement of the Court that if the registrant wished to test the classification of the Local Board he should have reported for service and made a test by means of habeas corpus proceedings (Transcript of Testimony 39).

Petitioner made a second special objection to the general charge of the Court to the jury in that said charge asserted that the classification made by the Local Board and the Board of Appeals is binding upon the trial court. This objection was made on the basis that there was great arbitrariness on the part of the Local Board and due to the fact that petitioner was denied a fair hearing before said Local Board (T. T. 39).

Petitioner offered the two following specific charges to the jury which were declined by the Court and to which the defendant respectfully excepted at the time:

1. If from all the facts in the case you find that the Local Board was prejudicial, unfair, arbitrary and capricious toward the defendant in its classification and its refusal to grant him a hearing, then you will return a verdict for the defendant.
2. If from all the facts in the case you find that the defendant at all times during the time that he was under the jurisdiction of the Selective Service System has been a regular and/or duly ordained minister of religion and that the Local Board and the Board of Appeals had knowledge of this from the evidence presented, then you will return a verdict for the defendant.

Clearly the refusal of the Court to make the requested charges before the jury retired for consideration was grave error and denied petitioner the right of due process of law. He entered his timely exceptions to the refusal of the Court to grant these special charges.

On the same day the jury returned a verdict of "guilty". Thereafter and before the sentence was pronounced upon petitioner, he made a statement before the

Court which is found on pages 41 to 47, inclusive, of the Transcript of Testimony. The Court sentenced him by committing him to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. From the verdict of the jury and the judgment of the Court appeal was duly taken to the Circuit Court of Appeals for the Third Circuit at Philadelphia.

5. Opinions of the Courts Below.

No written opinion or otherwise was rendered by the United States District Court for the Western District of Pennsylvania at Pittsburgh except such as was expressed at various times during the course of the trial, in the Court's charge to the jury and the Court's remarks during the defendant's statement, all on December 1, 1942. All of the remarks by the Court are found in the Transcript of Testimony which is part of the record in the instant case and in the Appendix for the Appellant. The opinion of the Circuit Court of Appeals for the Third Circuit was given on May 6, 1943, and affirmed the judgment of the trial court on the basis of *United States v. Grieme*, 3 Cir., 128 Fed. 2d. 811, without comment.

B

Questions Presented

1. Can a district court deprive a defendant from asserting his rights under the Selective Training and Service Act by excluding from the record all evidence showing that the defendant was exempt from all kinds of service under the Act because he was an ordained "minister of religion"?

2. — Is a defendant in a case under the Selective Training and Service Act permitted to offer evidence showing he was not delinquent as charged in the indictment because he was an ordained minister exempt from the provisions of the Act and that the Local Board did not have jurisdiction to order him to report for induction?

3. Is the action of the Local Board subject to judicial review in a criminal action brought under the Selective Training and Service Act when evidence is offered to show that a fair hearing allowed by the Selective Service Regulations was denied the registrant?

4. Is the action of a Local Board subject to judicial review in a criminal action brought against a registrant under the Selective Training and Service Act where the evidence offered shows that the board was unfair, arbitrary and capricious in considering the classification of registrant?

5. In a criminal action brought under the Selective Training and Service Act, is a registrant confined solely to the issue of whether or not he reported for induction so as to exclude his defenses of confession and avoidance?

6. Is a registrant required to report for induction and submit to the military or other authorities under the Selective Training and Service Act and then resort to habeas corpus proceedings as his only remedy to question the arbitrary and capricious action of the Local Board under the Act?

7. Did the trial court commit reversible error in charging the jury that the only question involved was whether or not the defendant reported for induction over the objection and exception of the defendant?

8. Did the trial court commit reversible error in declining two charges timely requested by the defendant asking the jury to consider whether or not the Local Board had been prejudicial, unfair, arbitrary and capricious in rendering its classification?

9. Is a defendant precluded from offering proof in his behalf as a regular and duly ordained "minister of religion" when the Local Board denied him a fair hearing, prevented him from presenting evidence at the hearing, was arbitrary and capricious, when Title 50 U. S. C. A. 305 (d) [Selective Training and Service Act, Section 5(d)] exempts from training and service, but not from registration, a regular and duly ordained "minister of religion"?

10. Was the trial court justified in limiting the evidence to a consideration of whether or not the defendant reported for work of national importance under the Selective Service System when the Local Board denied him a hearing, prevented him from presenting material evidence that he was an ordained minister and by their statements and actions were unfair, arbitrary and capricious toward the defendant because he was one of Jehovah's witnesses?

The foregoing questions were seasonably and duly presented to the Courts below, put at issue matters relative to federal law, regulations, criminal procedure guaranteed by the Fifth and Sixth Amendments to the United States Constitution and involve an investigation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. These substantial federal questions are now presented to this Court for review.

C

Reasons Relied on for Allowance of Writ

The questions presented herein are of national importance and seriously affect the life and liberty of thousands of persons who are subjected in many instances to the unfair, arbitrary and capricious actions of Local Boards under the Selective Service System. While for the most part the boards created under the Selective Training and Service Act of 1940 are properly functioning in accordance with the law; there seems to be no practical means available at present whereby an innocent victim, who has valid and indisputable grounds for exemption, can assert a defense when he falls into the clutches of an unfair, arbitrary and capricious Local Board.

A new theory which has grown up in the past year, that the only defense a registrant may offer is whether or not he reported for induction regardless of the unfair and arbitrary action of the Local Board, has worked destruction to the long and established principles of criminal jurisprudence. The age-long and accepted principles of self-defense, confession and avoidance, arbitrary and capricious actions of administrative boards, exemption by law and justification are all flaunted and set aside.

Despite the many lower court decisions dealing with challenges to the arbitrary and unfair actions in isolated cases, both under the 1917 and the 1940 laws, there has been no decision by this Court indicating that their determination can be judicially scrutinized when said determination is tainted by unfair, arbitrary, capricious and foul action, nor has this Court determined by what procedure the unfair action of the erring draft board may

be called into question. This Court has repeatedly held that in civil actions the findings of administrative boards may justly be judicially reviewed when their conclusions are marked by unfair, arbitrary and capricious conduct, some of the many instances being *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 28, 49-54; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Mooreland v. United States*, 280 U. S. 420, 444; *Florida v. United States*, 292 U. S. 1, 12 and many others. Relief has been granted repeatedly by this Court when administrative boards had been unfair and capricious in their findings; and in those civil cases only monetary considerations were involved. Are we to say that in criminal cases relief is not allowed because the life and liberty of individuals are at stake? To hold to such a conclusion we must necessarily conclude that here in America during the past year 'the almighty dollar' has become more sacred than the life and liberty of the people.

The United States Circuit Courts are decidedly at variance with each other when several have suggested that, by *obiter dictum*, the action of the Local Boards may be subject to review when their conclusions are tainted with unfairness and arbitrariness (*Goff v. United States of America*, 4th Cir., May 4, 1943; *United States v. Di Lorenzo*, 45 F. Supp. 590). However, when the lower courts are confronted with a case which actually involves unfairness by which a registrant is denied a hearing and where the conclusions of the boards are tainted by capriciousness, as in the instant case, there is an evasion of the issues. The Circuit Court of Appeals for the Third Circuit in the instant case affirmed the judgment of the

trial court in a 'one sentence' opinion without explanation other than it mentioned its own decision in the case of *United States v. Grieme, supra*. There is need for the Supreme Court to act on such a grave situation. Otherwise the people suffer, not because they have no defense, but because the local boards in some instances are capricious and unfair. Wrongs have been committed and there are no remedies.

The destructive effect on criminal jurisprudence is apparent when one is prevented from asserting a defense in a criminal action which he has in fact and by Act of Congress, and he is forced in the corner by the question, 'Did you report?' 'The Court is not caring whether the Local Board made a mistake or not, it matters not nor is it material whether the Local Board was arbitrary or unfair, their finding is conclusive.' The future of such criminal procedure is ominous,—no longer will it be asked whether the man took life in self-defense, but only whether the gun was fired. Under the new theory in cases of assault and battery with the multifarious crimes attended thereto, the question will never be asked 'Were you pushed into a corner?', or 'Were you provoked to commit the act when all other avenues of self-defense were taken away?' In cases of alleged rape the defense of consent and provocation will be removed. Even the laws of the Almighty God assure a man the privilege of self-defense and extenuating circumstances; for under the Mosaic law a man was justified in taking the life of the man who broke into the house of another with the purpose of committing mischief (Exodus 22:2). This new theory turns the law of God and man upside down.

A further effect of limiting the defense of a registrant to the issue of whether or not he reported for induction

or service is virtually to force him to plead 'guilty' and take from him the right of assistance by counsel. To disarm an individual of all his defenses except one, especially where the administrative board is unfair and capricious, and substitute the tyrannical power of the administrative body for law and order pursued in the ordinary avenues of court procedure is depriving the individual of property, liberty, and in some cases of life without due process of law. To place a defendant in a corner without any means of defense, save the answer to one question, and virtually to deprive him of the assistance of counsel when all legal remedies are closed is to go decidedly contrary to the letter and the spirit of the Fifth and Sixth Amendments to the Constitution of the United States. The framers of the Constitution never intended to substitute the dictatorial rule of man for the due process of law in any criminal action.

The course pursued during the past few months by many of the courts of the land is diametrically opposed to the protecting provisions for the defendant with respect to criminal actions as emphasized by the aforesaid Fifth and Sixth Amendments. The construction given those amendments must be in accord with the intention and contemplation of the law makers at the time of their adoption. When the founders of this Nation wrote the provisions relative to criminal law, there existed at that time no administrative boards to substitute their own whims for the law of the land; the spirit of totalitarianism and arbitrary oppression was entirely absent from consideration in criminal matters, and certainly the spirit of the Constitution sought to give new life to the rule of law, and for ever put to death the reign of tyranny.

Still another distasteful effect of limiting the defendant to the assertion of one issue, is that it practically deprives him of a trial. The meaning and contemplation of a 'trial' is that it embraces a presentation of all the material facts for the deliberation and consideration of the arbiter so that a judgment may be reached which is consonant with the law. The criminal law as intended by the framers of our Constitution embraces such a trial and anything short of just what is intended by the Federal Constitution is a decided violation of the due process clause of the Fifth Amendment. To deprive a defendant of his material defenses is to deny him of a fair and impartial trial.

Another error into which the Courts have fallen by following the *Grieme-Sadlock* Opinion [supra, and appearing as Appendix hereto] is that one must resort to habeas corpus proceedings before he can question the arbitrary and capricious manner of the Local Board or if the board denies the registrant a full and fair hearing. Right here it may be said that neither the Constitution of the United States nor the general law of criminal procedure has ever said before that one must give up his liberty, and maybe his life, before he would be granted the privilege of asserting his defenses. The price of a fair and impartial trial is not to be purchased at such a cost. What the Constitution of the United States grants as a right to a defendant in a criminal action no Court can burden. The Sixth Amendment to the Federal Constitution says that "In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury"; it does not say that the 'accused may enjoy such right only after paying the price by giving up his liberty.' The conclusion of this point is 'there shall be no burden placed upon the right of a speedy and public trial.'

It is submitted that this case is one calling for the exercise by this Court of its supervisory powers under Section 240 (a) of the Judicial Code [28 U. S. C. A. paragraph 347 (a)] and Rule 38, paragraph 5 (b) of Rules of this Court.

WHEREFORE your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the trial court, be here set aside and held for naught; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

NICK FALBO

Petitioner

By HAYDEN C. COVINGTON
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

**NICK FALBO, *Petitioner****v.***UNITED STATES OF AMERICA**

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPORTING BRIEF**Specifications of Error**

The petitioner assigns the following errors in the record and proceedings of said cause:

The United States Circuit Court of Appeals for the Third Circuit committed fundamental error in affirming the judgment of the trial court because

- (1) Where the Act of Congress and Presidential Regulations specifically exempt a registrant from training and service no Local Board by unfair and arbitrary action can deprive a defendant from asserting his rights under said Acts and Regulations, and the exclusion of evidence asserting such rights of defense in a criminal action by the trial court is reversible error.

(2) The actions of a Local Board are subject to judicial review when it denies a registrant a hearing accorded him under the Regulations and when the actions of said Board are unfair, arbitrary and capricious, and the proceedings of the trial court preventing review under such circumstances are subject to reversible error.

(3) To confine the issue in a criminal case to whether or not the petitioner reported for service when the Local Board denied him a hearing and was arbitrary and capricious, and thereby excluding the defense of confession and avoidance, is a direct violation of the rights of trial and due process guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

(4) To force a registrant to resort to habeas corpus proceedings before he is entitled to assert the defense of confession and avoidance is placing an undue burden upon the right to a speedy and public trial and depriving a defendant of his liberty without due process of law, all contrary to the Fifth and Sixth Amendments to the Constitution of the United States.

For each of the above reasons the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed.

Argument

The conviction of the petitioner by the trial court and the affirmance thereof by the Circuit Court of Appeals for the Third Circuit were a gross violation of the petitioner's rights and thwarted the plain intention of Congress. The act of Congress and the Presidential Regulations material to this case are detailed herein under

Section 3 of the Summary Statement of Matters Involved at page . Title 50 U. S. C. A. 305 (d) specifically provides that regular or duly ordained ministers of religion shall be exempt from training and service under the Selective Training and Service Act of 1940 but not from registration. The undisputed evidence revealed that the petitioner was a regular and duly ordained "minister of religion", being a pioneer minister of Jehovah's witnesses and the Watchtower Bible and Tract Society, and putting in his full time in that profession at all times that he was subject to the jurisdiction of the Selective Service System. Because he was operating as one of Jehovah's witnesses the Local Board took prejudicial exception to his being classified as a minister holding that it did not "have any damned use for Jehovah's witnesses" and when the petitioner attempted to produce evidence at the hearing before the board it said, "We have no time to listen to this," and he was dismissed.

The uncontroverted evidence in the case reveals that the petitioner was engaged as an ordained minister since July 1, 1930. He was recognized as such not only by Jehovah's witnesses but by individuals adhering to various denominations, both Catholic and Protestant. From the time that he filed his questionnaire to the time of his conviction he asserted his ministerial status and asked for classification as a minister, specifically stating that he desired a 4D classification; and it was only because of the arbitrary and capricious action of his Local Board that he was not given the proper classification. At the time of his trial the District Court at Pittsburgh refused to consider any other question than "whether he reported or not". It is apparent that the petitioner has been deprived of his liberty and rights without due process of

law,—all contrary to the Fifth and Sixth Amendments to the Constitution of the United States.

This Supreme Court of the United States has laid down the rule that wherever an administrative body created by the legislature acts within the sphere of its authority in a fair and unprejudiced manner its findings are not subject to judicial review by the courts; but where a hearing has been denied, where the board has violated the rules specifically ordering its conduct, where the administrative body has acted unfairly, arbitrarily and capriciously and there is a deprivation of rights, either of person or property, the acts will be reviewed by the Court, and the judiciary will not be ousted by any legislative arrangement designed to preclude judicial determination. In this connection see specifically *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 49 to 54; *Interstate Commerce Commission v. Louisville & Nashville Ry. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co. v. United States*, 272 U. S. 658, 663; *Tagg Bros. & Mooreland v. United States*, 280 U. S. 420, 444; *Florida v. United States*, 292 U. S. 1, 12.

This Court has repeatedly held that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; or if the finding was contrary to the 'indisputable character of the evidence'. In this connection see *Tang Tan v. Edsell*, 223 U. S. 673, 681; *Clin Yoh v. United States*, 208 U. S. 8, 13; *Low Wah Suey v. Backus*, 225 U. S. 460, 468; *Zakonaite v. Wolf*, 226 U. S. 272. If the facts found do not, as a matter of law, support the order made, such order is void. *United States v. B. & O. S. W. Ry.*, 226 U. S. 14; *Atlantic O. L. v. North Carolina Corp. Com.*, 206 U. S. 1, 20; *Wisconsin M. & P. R. Co. v. Jacob-*

son, 179 U. S. 287, 301; *Oregon Railroad v. Fairchild*, 224 U. S. 510; *I. C. C. v. Illinois Central*, 215 U. S. 452, 470; *Southern Pacific Co. v. Interstate Com. Comm.*, 219 U. S. 433; *Muser v. Magone*, 155 U. S. 240, 247.

If judicial review is proper in the courts when administrative boards have refused to grant a hearing, and inadequate hearing or have acted unfairly, arbitrarily and capriciously in matters respecting to civil matters, the same rule should logically apply with even greater force when the liberty, and maybe the life, of a defendant is involved in a criminal action. The Constitution of the United States is particularly solicitous with respect to guarding the rights of the individual charged in criminal actions lest grave injustices be perpetrated here in America once experienced under the yokes of European despots. Civil cases usually involve money and property liabilities; while criminal actions involve the liberty and life of individuals. Have we come to the position in this country when money and property considerations are at a greater premium than life and liberty?

The strange doctrine of limiting the defense of a person charged with crime to whether or not the act was committed has been unheard of in this country until very recently. It is not supported by the Constitution of the Nation, neither is it supported by the American system of criminal jurisprudence. The writers of the Fifth and Sixth Amendments to the Constitution of the United States never intended that the right of trial in a criminal action precluded the defense of confession and avoidance. The Constitutional guarantee of right to trial includes the right to present all material defenses; otherwise innocent persons would be deprived of their rights, liberties and life without due process of law. The right of

self-defense when all other available remedies have been taken away is sanctioned by both God and man, such a right is based on fundamental justice and any theory which seeks to overthrow this fundamental legal principle is certain to have a speedy end. Why wait to set aside this fundamental error? Why not remove it forever before the resultant devastation makes further inroads into criminal procedure?

This baneful doctrine of chiseling down the defenses of an individual is largely the result of the cases of *United States v. Grieme* and *United States v. Sadlock*, 3 Cir. 128 F. 2d 811, wherein it is provided that

"The correctness of the classification made by the local draft board and the question whether the board acted in an arbitrary manner are not defenses to a prosecution under the Act for a failure to comply with the board's order."

An examination of the Selective Training and Service Act of 1940, as amended, definitely reveals that the Courts have read into the Act something that is not there, the pertinent parts of the same stating:

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . who in any manner shall knowingly fail or neglect to perform any duty, required of him under or in the execution of this Act, . . . shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished." [St. & S Act, Sec. 11]

There is nothing here that warrants the limitation of the defense to the question of whether or not one failed

to perform an assigned duty. Even if the legislative fiat had so limited the defense to whether or not the act was committed, or had placed the stamp of finality upon the board's findings, such would not preclude judicial scrutiny when the board's actions were tainted with arbitrariness and when the petitioner herein was denied a hearing. On this very point see *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 49-54.

The effect of permitting such a doctrine as announced in the *Grieme-Sadlock* cases, supra, to continue would be disastrous. It would only be the next step to deprive an innocent person of the right of self-defense by the statement 'we do not care if your life was threatened and you were helpless, the only question is whether or not you fired the shot at the burglar.' Under the *Grieme-Sadlock* decision in case of assault and battery or assault and the multifarious associated crimes one could not plead any extenuating circumstances, as 'he forced me into the corner, he provoked me to do the act, I retreated to the wall, or he had me down and was about to take my life with a dagger'; no the only question under the new theory would be, 'did you commit the act?' Such curtailment of defenses would multiply and encourage crimes of all kinds in the United States, and the penitentiaries in a fortnight would be bursting for want of capacity. Such a theory is downright unreasonable! The voice of criminal experience throws it out of our jurisprudence! It has no place in America!

Now, let us examine some of the decisions prior to that of *Grieme-Sadlock* that hewed to the line of sound jurisprudence. In *United States v. Newman*, 44 F. Supp. 817, Judge Lindley stated that on the same principles that control in applications for writs of habeas corpus the

defendant could in cases involving Selective Service raise the same defenses in a criminal case, namely "the question of whether the board had jurisdiction, whether there was a fair hearing, or whether the action taken was arbitrary or unlawful." In the case of *United States v. Di Lorenzo*, 45 F. Supp. 590, Judge Leahy said that "the federal district courts may disturb such findings only when it appears that the party involved has not been offered a 'full and fair hearing', or that the administrative officers have acted contrary to law, or have manifestly abused the discretion committed to them by the statutes." It is quite certain that the fact that the Local Board refused to hear the petitioner herein, and manifested malice because the registrant was a Jehovah's witness, would warrant judicial review in the criminal action. Judge Bell of the Minnesota District Court, in an article in the March, 1942, issue of the American Bar Association Journal, expressed the same opinion, "On principle, it would seem that the defendant should be permitted to offer as a defense (to an indictment) the same questions that he could present in a habeas corpus proceeding, that is . . . whether the action of the board was arbitrary or unlawful."

The state courts have reached similar conclusions with respect to the principles of criminal procedure involving the arbitrary actions of administrative boards. The nearest cases are those growing out of quarantines, both of humans and of animals. In *State v. Rachskowski*, 86 Conn. 677, a woman was convicted for violation of a quarantine order. She urged that there was no basis for the order since there was no ground for reasonable belief on the part of the authorities that she was infected with a contagious disease. Her right to urge this objection to the

order was sustained and her conviction reversed. See also *State v. Kirby*, 120 Iowa 26; *Crane v. State*, 5 Okla. Cr. 560; *Richter v. State*, 16 Wyo. 437, and *People v. Kaye*, 212 N. Y. 407 at 416.

To compel a person to resort to habeas corpus proceedings before he can present his defenses is a subterfuge whereby the purpose of the Constitutional guarantees are defeated. The writers of the Constitution never dreamed of the necessity of giving up one's liberty before he would be entitled to a speedy and public trial. This added burden asserted without any supporting authority in the *Grieme-Sadlock* opinion is an uncalled for parasite which is sure to choke the otherwise just system of criminal procedure. Many times this court has frowned upon burdens upon, subterfuges to circumvent and repressive measures against the rights of the people. We must remember that the Fifth and Sixth Amendments to the Federal Constitution embrace some of the restrictions upon the Federal Government, and these regulations are binding upon the judiciary thereof. When the Federal Courts, as in the *Grieme-Sadlock* opinion, seek to circumvent the rights of the citizen to a speedy and public trial and to burden the procedure outlined in the Constitution, such new and fantastic judicial theories must be put to an end as soon as possible.

The effect of subjecting one's self to induction into the army or into national service before one could assert the right of asserting the defenses sanctioned by the Act of Congress is an undue hardship. Under habeas corpus proceedings the petitioner must bring the action in the place where he is held in custody or where his superior officer is located. This place of custody may be hundreds of miles away and there would be great hardship in insti-

tuting action far removed from the state and district of the local board and the witnesses upon whom the defendant might rely. If the individual were transported to foreign shores, the privilege of asserting any of the defenses would be absolutely taken away.

But there is still a more vulnerable defect in this substitution of habeas corpus procedure for the criminal action guaranteed by the Federal Constitution. If habeas corpus were substituted for criminal action the benefits and rights secured thereby should be just as sure, certain and complete as those afforded by those rights already detailed in the Sixth Amendment to the United States Constitution. It is one of the requisites of obtaining a writ of habeas corpus, that the action must be maintained in the district and state where the prisoner or relator is held. This must mean in the district where the superior officer has charge of the relator. This may be outside of the state and district where the alleged offense is claimed and far removed from the draft board who is responsible for the miscarriage of justice. Now let us note that the Sixth Amendment provides that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." To force the transfer of the locus of the trial wherein the relator may offer his defenses to another district is absolutely taking away the rights guaranteed by the Sixth Amendment to the Constitution.

The whole theory advanced by the *Grieme-Sadlock* decision is so honeycombed with defects that it should be thrown by the wayside immediately and without any hesitancy.

Conclusion

For the reasons presented above (1) that the Local Board was prejudiced against the petitioner in that it denied him a hearing and was arbitrary because he was one of Jehovah's witnesses, (2) that an administrative board's findings should be subject to judicial review in a criminal action when its conclusion is tainted with unfairness and capriciousness, (3) that fundamental principles of justice are violated by depriving one of defenses intended by Congress and the Presidential Regulations, (4) that the age-established principles of confession of avoidance and defense have been violated as shown by the record in this case, and (5) that compelling the petitioner to resort of habeas corpus proceedings before he could assert his defenses is entirely unconstitutional and violative of common sense and justice, there is here presented a case calling for urgent action by the powers of this Court in accordance with Section 240 (a) of the Judicial Code [28 U. S. C. A. paragraph 347 (a)] and Rule 38, paragraph 5 (b), Rules of this Court. To that end this petition for writ of certiorari should be granted so as to correct the errors complained of here and committed by the court below against the petitioner.

Respectfully submitted,

HAYDEN C. COVINGTON
VICTOR F. SCHMIDT

Attorneys for Petitioner

Appendix

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 7967 October Term 1941
[128 F. 2d 811]

UNITED STATES OF AMERICA

v.

EDWARD JOHN GRIEME,
Defendant-Appellant.

No. 7968 October Term 1941

UNITED STATES OF AMERICA

v.

ALBERT SADLOCK,
Defendant-Appellant.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW JERSEY.

OPINION

(Filed June 9, 1942)

Before BIGGS, JONES and GOODRICH, *Circuit Judges.*

JONES, *Circuit Judge.*

The appellants, who were indicted and tried separately, were each convicted of a willful violation of Sec. 11 of the Selective Training and Service Act of 1940 (50 U.S.C.A. (Appendix) §311).¹ Each has appealed from the respective judgments of sentence entered by the court below upon the several verdicts. As both cases present substantially similar facts and as the questions of law raised by the appellants are identical, the appeals were consolidated, on motion, by order of this court and will be disposed of in one opinion. Fundamentally, the question involved is whether a registrant under the Selective Service Act, who has deliberately refused to obey his draft board's order of induction, may defend to a charge of willfully violating the Act by showing that the board erred in classifying him.

Each of the appellants, both of whom are members of the religious sect known as Jehovah's Witnesses registered under the Selective Service Act. Each filled out a questionnaire which he filed with his local draft board. Therein he set forth his membership in the religious sect which, as he averred, had ordained him as a minister for the purpose of expounding the sect's beliefs and distributing its tracts and pamphlets. He accordingly claimed exemption as a minister of religion and sought classification as such under IV-D. Each of the registrants

¹ Sec. 11 of the Selective Training and Service Act of 1940 provides in material part as follows:

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished * * *"

also filled out and filed with his draft board the form provided for those claiming classification under IV-E as conscientious objectors. The draft board duly classified each of the registrants as a conscientious objector under class IV-E and sent them notices to that effect. Requests for reclassification as ministers of religion under IV-D having been refused by the local draft board, each of the registrants appealed to the county board of appeals, which sustained the action of the local draft board. Thereupon each of the registrants wrote to the office of the Director of the National Headquarters of the Selective Service System at Washington, D. C., seeking reclassification in accordance with his claim for exemption. Nothing more was done by National Headquarters with these letters than to transmit to the local draft board the registrant Sadlock's letter. In due course, the local draft board, continuing to find that the registrants were not entitled to classification as ministers of religion, sent each a notice to appear on a day certain for induction as a conscientious objector for the performance of work of national importance of a noncombatant nature. Each of the registrants knowingly and deliberately refused to obey the local draft board's orders of induction. Their indictment for a willful violation of Sec. 11 of the Selective Service Act followed.

At trial the government's proofs embraced the record facts with respect to each of the registrants, to which we have already made reference. In defense, each of the registrants offered to prove that he was an ordained minister of the Jehovah's Witnesses, this, for the avowed purpose of establishing error as the result of arbitrary and capricious conduct on the part of the local draft board in classifying the registrants, who urged that the draft board's

alleged error justified them in refusing to obey the board's order of induction and that therefore they were not guilty of willful violation of the Selective Service Act.

The learned trial judge excluded the particular matter proffered in defense, refused to charge the jury, as requested, that if the registrants should have been classified under IV-D rather than IV-E, their failure to comply with the draft board's order of induction was not a violation of the Act, and instructed the jury to disregard that portion of the summation by defendants' counsel wherein he argued to the same effect as his request for charge which had been refused. We think that the matter offered by the defendants, relating, as it did, to the draft board's exercise of its discretion in its administration of the Selective Service Act, was wholly irrelevant and immaterial to the charge contained in the indictment and that the action of the trial court was proper.

Section 10 (a) (2) of the Selective Training and Service Act of 1940 (50 U.S.C.A. (Appendix) §310 (a) (2)) provides in part here material that " * * * Such local [draft] boards * * * shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards * * *, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules or regulations as the President may prescribe."

The courts have uniformly ruled that the findings whereon draft boards base their decisions are final and may not be disturbed by the courts unless it appears that

the person affected thereby has not been afforded a full and fair hearing or unless the members of the local draft board acted contrary to law or abused the discretion reposed in them by the statute. *United States ex rel. Pascuito v. Baird*, 39 F. Supp. 411, 413 (E.D.N.Y.); *United States ex rel. Broker v. Baird*, 39 F. Supp. 392, 394 (E.D.N.Y.); *United States ex rel. Errichetti v. Baird*, 39 F. Supp. 388, 391-392 (E.D.N.Y.); *United States ex rel. Filomio v. Powell*, 38 F. Supp. 183, 189 (D.N.J.); *Dick v. Tevlin*, 37 F. Supp. 836, 838 (S.D.N.Y.). A similar rule has been evolved by court decision under the Selective Draft Law of 1917: *Arbitman v. Woodside*, 258 Fed. 441, 442 (C.C.A. 4); *United States ex rel. Pascher v. Kinlead*, 250 Fed. 692, 694 (C.C.A. 3); *Boitano v. District Board*, 250 Fed. 812, 813 (N.D.Cal.). No jurisdiction is conferred upon the courts by the Selective Service Act of 1940 to review the findings of local draft boards. *Shimcha v. Local Board*, 40 F. Supp. 808, 810 (N.D. Ohio); *Petition of Soberman*, 37 F. Supp. 522, 523 (E.D.N.Y.). Here again the rule is similar to the construction placed upon the Selective Draft Law of 1917. See *Ex parte Hutfliis*, 245 Fed. 798, 799 (W.D.N.Y.). Nor is the merit of the decision by a local draft board subject to court review upon writ of certiorari (*Allison v. Local Board*, 43 F. Supp. 896 (N.D.Cal.)) or upon writ of habeas corpus (*United States ex rel. Troiani v. Heyburn*, 245 Fed. 360, 362 (E.D.Pa.)). However, a registrant who has been inducted pursuant to the Selective Service Act may, by writ of habeas corpus, obtain a judicial determination as to whether the local draft board acted in an arbitrary and capricious manner or denied the registrant a full and fair hearing. See *United States ex rel. Pascuito v. Baird*, *supra*; *United States ex rel. Errichetti v. Baird*, *supra*; *Application of*

Greenberg, 39 F. Supp. 13, 16 (D.N.J.); *United States ex rel. Filomio v. Powell*, supra, at p. 186; *Dick v. Tevlin*, supra.

Whether a registrant is a minister of religion presents a question of fact which, from its very nature, is committed by the Act to the determination of the competent local draft board. *Johnson v. United States*, 126 F.2d 242, 247 (C.C.A. 8). The only appeal from a finding of such nature is the appeal provided by the Act to the county appeal board. It is only in a limited number of instances which involve primarily questions of dependency that registrants may appeal to the President;² and the records in the instant cases do not present situations appropriate for appeal to the President. Persons obliged to register under the Selective Service Act are not entitled to exemption as a matter of right. The discretion to determine whether certain classes of registrants should be exempted or deferred is reposed by the Act in the President and the boards or agencies which he is further authorized to create for the purpose of administering the Act. In *United States ex rel. Koopowitz v. Finley*, 245 Fed. 871, 877 (S.D.N.Y.), which arose under the Selective Draft Law of 1917, the court said that "Whether a person is a nondeclarant alien or not is a question of fact, exactly the same as whether a person is a duly ordained

²Vol. 3 Selective Service Regulations §27 provides that appeal from a determination of a board of appeal may be made to the President, only if all the following conditions are satisfied: (1) the appeal board must have placed the registrant in Class I or Class IV-E, and at least one or more members of the board of appeal must have dissented from a determination that the registrant should not be deferred because of dependency; (2) the appeal to the President must be on ground of dependency alone; (3) appeal must be signed by registrant, dependent of registrant, or government appeal agent; (4) appeal must be made within five days of mailing of Notice of Classification or Notice of Continuance of Classification, unless local board grants extensions of time; and (5) a member of local board, the government appeal agent, or the Governor must explain and certify, in writing, that great and unusual hardship will follow the induction of the registrant, and the person so certifying must specifically recommend deferment.

minister of religion * * *, and the clear purpose of the act was that the fact should be ascertained by the administrative boards which the President was authorized to create. Any other method would have made the act, * * * unworkable * * *.

As the decision of the local draft board with respect to the proper classification of each of the present appellants was final and conclusive, alleged error of decision by the board in the exercise of its statutory discretion was not germane to the charge for which the appellants were indicted and was therefore not for the consideration of the jury. What the jury was required to determine was whether the registrants after classification, which had been confirmed on appeal, intentionally ignored the board's order to report for induction (an offense under Sec. 11 of the Act). Any matter exculpatory of the defendants would be such as indicated their lack of intent to disregard the board's order, e.g., if the board failed to send the registrants notice to appear, or if the registrants did not receive the notice through no fault or neglect of their own. The correctness of the classification made by the local draft board and the question whether the board acted in an arbitrary or capricious manner are not defenses to a prosecution under the Act for a failure to comply with the board's order. In *Johnson v. United States*, supra, it is intimated that perhaps a defendant in a prosecution under the Act for refusal to report for induction may raise an issue as to whether the local board acted in an arbitrary and capricious manner. The intimation, however, is merely a dictum. What was actually held was that no such question could be raised in that case since the defendant had not exhausted the administrative remedies open to him.

We think it is clear that, if a local draft board acts in an arbitrary and capricious manner or denies a registrant a full and fair hearing, the latter, although bound to comply with the board's order, may, by writ of habeas corpus, obtain a judicial determination as to the propriety of the board's conduct and the character of the hearing which it afforded. The registrant may not, however, disobey the board's orders and then defend his dereliction by collaterally attacking the board's administrative acts. The court below therefore properly excluded the matter proffered in defense by the present appellants.

The judgment of the District Court in each case is affirmed.

A true Copy:

Teste:

*Clerk of the United States Circuit Court of Appeals
for the Third Circuit.*